INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Armand Co. v. *Federal Trade Commission*, 84 F. 2d 973, certiorari denied, 299 U.S. 597	9
Civil Aeronautics Board v. *Hermann*, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359	8
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501	6, 7, 8
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683	7–8
Federal Trade Commission v. *Crafts*, 355 U.S. 9, reversing *per curiam* 244 F. 2d 882	8
Kuhn v. *Civil Aeronautics Board*, 183 F. 2d 839	9
Macauley v. *Waterman S.S. Corp.*, 327 U.S. 540	7
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41	7
National Labor Relations Board v. *Mackay Radio & Tel. Co.*, 304 U.S. 333	9
Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186	6, 7, 8, 9
United States v. *Morton Salt Co.*, 338 U.S. 632	8

Statutes:

Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. 1005(c): Section 6(c)	3
Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 41 *et seq.*:	
Section 5	7, 8
Section 9	2, 9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 741

ELMER C. ADAMS, SR., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A22–A41)[1] is reported at 296 F. 2d 861. The opinion of the district court (Pet. A4–A20) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1961 (Pet. A21). The petition for a writ of certiorari was filed on February 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet." refers to the petition. In accordance with the designation adopted in the petition (p. 2, n. 1), references to the printed record in the court of appeals will be cited as "R."

QUESTION PRESENTED

Whether, in an action to enforce administrative subpoenas issued by the Federal Trade Commission pursuant to complaints alleging that petitioners had violated Section 5 of the Federal Trade Commission Act, a district court has jurisdiction and is required to test the legal sufficiency of the complaints in determining the extent to which the subpoenas should be enforced.

STATUTES INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this Act * * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation * * *.
>
> * * * And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 6(c) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. 1005(c), is set forth in Appendix A to the petition (pp. A1–A2).

STATEMENT

This petition seeks review of an order of the Court of Appeals for the Eighth Circuit affirming the district court's holding that in proceedings brought by the Federal Trade Commission to enforce its subpoenas, the court was without jurisdiction to test the legal sufficiency of the underlying Commission complaints. The litigation began when the Federal Trade Commission filed three complaints against the Adams Dairy Co. ("ADC"), and Adams Dairy, Inc. ("ADI"), each alleging that ADC, ADI and a named retailer grocery chain (Kroger, Safeway or A & P) had effectuated a conspiracy to restrain interstate trade by fixing prices and price differentials in the sale of dairy products and by coercing competitors into following the prices and price differentials thus set (R. 8–9; see R. 10, 11). More specifically, the complaints charged that pursuant to this conspiracy the petitioner dairies had (1) sold to the grocery chains in certain areas at prices lower than they charged in other areas, including prices below cost; (2) furnished coupons, merchandise and other devices for use by the chains in selling their milk products in certain areas but not otherwise; (3) guaranteed the chains a fixed profit margin on sales of their products, regardless of the prices at which they were sold to the consumers; and (4) contributed advertising allowances to the chain defendants not ac-

corded competing purchasers on proportionally equal terms (R. 9).[2] The complaints charge (see R. 9) that these conspiracies and acts and practices constitute unfair methods of competition and unfair acts and practices prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

A date having been set for a hearing on the charges, the hearing examiner issued a total of six subpoenas *duces tecum* and *ad testificandum* to various of the petitioners (Pet. A23–A24; see R. 12–18, 38–42). Following the denial of motions to quash (R. 19–28, 29–31), petitioners were ordered to comply and refused (Pet. A7–A8; see R. 32–35). Thereafter, the Commission instituted proceedings pursuant to Section 9 of the Federal Trade Commission Act (in the District Court for the Western District of Missouri) to obtain an order requiring production (R. 1–5, 37),[3]

The district court issued orders to show cause for the failure to comply (R. 44, 45) and the petitioners filed returns thereto contending that the complaints did not specify the charges with "reasonable definiteness" (R. 46) and therefore the subpoenas were "in-

[2] The chain store defendants were in turn charged, pursuant to the conspiracies, with (1) charging lower prices directly or indirectly (through bonus offers) for petitioners' goods in some areas than in others; (2) engaging in local price wars with the purpose and effect of injuring competition in dairy products; and (3) denying competitors and potential competitors of the dairy petitioners a chance to compete for the chains' business in dairy products and otherwise giving preferential treatment to the dairy petitioners (R. 8; see R. 10, 11).

[3] At the same time, the Commission also sought an order compelling the attendance of the individual petitioners, Adams, Sr., and Adams, Jr., at the hearing.

valid" because "they were not issued pursuant to lawful complaints" (R. 45). The asserted basis for this contention was that the complaints were "vague, indefinite and replete with conclusions of law which are wholly insufficient to inform respondents with reasonable definiteness of the charges which they are required to meet. Consequently, the complaints do not constitute lawful notice upon which proceedings before the Federal Trade Commission may be predicated * * *" (R. 45–46).[4] The court held that it did not have jurisdiction to determine the sufficiency of the complaints, because such jurisdiction "is vested solely in the Court of Appeals," but went on to state that assuming it possessed such jurisdiction, "the Complaint is adequate upon which to base the issuance of a subpoena, and to conduct the examinations incident to the investigation of the complaints against the various parties" (Pet. A14). However, "without questioning in any degree the right of the Commission to conduct its hearing or to proscribe or limit the extent thereof" (Pet. A16), the district court declined to enforce most of the specifications of the subpoenas because it found that the demands contained therein were either too broad or arbitrary or were not relevant to the charges made against petitioners (see Pet. A16–A20).

On cross-appeals from the order of the district court, the court of appeals, noting that the district

[4] The returns also made a broad attack on the scope of the subpoenas alleging, *inter alia*, that they "are invalid because they are unreasonably broad and do not specify as exactly as possible the material sought" (R. 46).

court had held that, if it had jurisdiction to pass upon the matter, it would have held the complaint sufficient (Pet. A27, n. 4), unanimously affirmed the district court's holding that it lacked jurisdiction to pass upon the sufficiency of the complaints (Pet. A30). It reversed the lower court's determination that the demands of the subpoenas were in large part unreasonable and therefore unenforceable (Pet. A41).[5] With respect to its ruling on jurisdiction, the court emphasized that the determination merely prevents petitioners from prematurely curbing the Commission's proceedings (Pet. A28) and does not deny them their right to judicial review of the sufficiency of the complaints. "After this case has run the gamut of administrative proceedings and if an order is entered affecting [petitioners], they may * * * secure judicial review of any action taken by the Commission" (Pet. A29).

ARGUMENT

The decision below is correct, and the petition presents no substantial question warranting review by this Court.

This Court's decisions in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, and *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, dispose of petitioners' contention that the district court had jurisdiction and

[5] "[L]ay[ing] the specifications alongside the complaints" (Pet. A32), the court of appeals concluded upon analysis (Pet. A33–A41) that the demands were essentially reasonable; and after modifying certain specifications it directed the district court to "order enforcement of all of the subpoenas issued in the proceeding instituted by the Commission, in accordance with the determinations herein made" (Pet. A41).

was required to test the legal sufficiency of the Federal Trade Commission complaints in determining whether to enforce the subpoenas. In those cases agency actions for enforcement of administrative subpoenas were opposed on grounds similar to those upon which petitioners rely here: that the administrative investigations (no complaints had been issued) were in excess of the agency's statutory jurisdiction; that the subpoenas were in violation of rights guaranteed by the Fourth and Fifth Amendments to the Constitution; and that immediate determination of the issues was necessary to prevent irreparable harm which compliance with the subpoenas would entail. The Court rejected each contention, holding that the district courts, in absence of express statutory authorization, have no jurisdiction to determine, in the course of proceedings brought by the agency to enforce administrative subpoenas,[6] the legal validity of proposed agency actions.

If, as *Endicott Johnson* and *Oklahoma Press* hold, the district courts are without jurisdiction to test the legal validity of an administrative investigation challenged as beyond the agency's statutory authority, then *a fortiori* jurisdiction is lacking in this case where the Commission's jurisdiction to proceed is admitted,[7] where lengthy complaints have been issued

[6] The same rule applies in actions brought to enjoin agency proceedings (see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *McCauley* v. *Waterman S.S. Corp.*, 327 U.S. 540).

[7] Petitioners conceded in the court below that the Commission was authorized under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, to institute the proceedings against them (Pet. A26). See, *e.g.*, *Federal Trade Commission* v.

and where petitioners' sole challenge is that the complaints do not contain factual statements "sufficient to inform [petitioners] with reasonable definiteness of the acts and practices alleged to be in violation of the law" (R. 45).

The fact that *Endicott Johnson* and *Oklahoma Press* recognize that district courts may be called upon to determine the relevance of materials sought by administrative subpoena does not afford jurisdiction to test the validity of the underlying complaints—a jurisdiction which those very decisions expressly found lacking.[8] Petitioners' contentions to the contrary—that unless the court first resolves the validity of their claim that the complaints are fatally defective for failing to set out the particular activities alleged to constitute illegal restraints of trade, it cannot make the required findings as to relevancy (Pet. 8)—are based upon a complete misunderstanding of the holding of these cases and the permissible scope of agency subpoenas. Thus, in *Oklahoma Press* relevancy was determined with respect to the subject matter of the investigation—"whether petitioners were subject to the [Fair Labor Standards] Act and, if so, whether they were violating it" (327 U.S. at 210). The Commission's complaints (see the Statement, *supra*) attacked by petitioners as "vague, indefinite and replete with conclusions of law" provide a much more

Cement Institute, 333 U.S. 683 (conspiracy to fix prices violates Section 5 of the Federal Trade Commission Act).

[8] See *United States* v. *Morton Salt Co.*, 338 U.S. 632; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359 (C.A. 9); *Federal Trade Commission* v. *Crafts*, 355 U.S. 9, reversing *per curiam* 244 F. 2d 882 (C.A. 9).

detailed basis for determining relevancy than did those general statements of the objectives of the investigation found sufficient in *Oklahoma Press.*[9]

Contrary to the implications of petitioners' argument, the subpoena power of the Commission under Section 9 of the Federal Trade Commission Act is not so limited as to require the Commission to identify in its complaints each and every specific act and practice alleged to violate the law in order to support subpoenas necessary to develop that information for the subsequent prosecution of the case. Instead, Section 9 of the Federal Trade Commission Act expressly provides that the Commission shall have the power to require by subpoena "the production of all such documentary evidence relating to any matter under investigation."[10] This does not mean that the Commission has unlimited powers of inquest. But, as the court below correctly indicated (Pet. A30), the standards of relevance to be applied by the courts in en-

[9] The Court stated in *Oklahoma Press, supra*, 327 U.S. at 208–209:

"* * * It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one."

[10] Even assuming *arguendo* (and contrary to the district court (Pet. A14)) that the complaints as written do not state a claim upon which relief can be granted, a cease and desist order based thereon would be valid if the Commission introduces sufficient evidence during the hearing to establish a violation of the Act and the respondents are given "actual notice and adequate opportunity to cure surprise" (*Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (C.A.D.C.); see *Armand Co.* v. *Federal Trade Commission*, 84 F. 2d 973 (C.A. 2), certiorari denied 299 U.S. 597; *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 349–350).

forcing administrative subpoenas are similar to those applicable in determining the scope of discovery proceedings under the Federal Rules of Civil Procedure. See *Oklahoma Press, supra,* 327 U.S. at 216; *Civil Aeronautics Board* v. *Hermann, supra,* 353 U.S. 322, 323, reversing 237 F. 2d 359 (C.A. 9). Accordingly, specification of the particular "acts and practices" alleged to constitute the offenses charged was not necessary in order to permit the courts to determine whether the particular demands of the subpoenas were (1) reasonably relevant to the charges in the complaint, (2) sufficiently definite and (3) not too broad.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
GEORGE R. KUCIK,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

ALVIN L. BERMAN,
Attorney,
Federal Trade Commission.

APRIL 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962